

CALIFORNIA COASTAL COMMISSION

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Staff:
Staff Report:
Hearing Date:

SMR-SF
March 26, 2004
April 14, 2004

FINDINGS FOR CEASE AND DESIST ORDER NO. CCC-04-CD-02

CEASE AND DESIST ORDER:	CCC-04-CD-02
RELATED VIOLATION FILE:	V-5-00-050
PROPERTY LOCATION:	3329 Ocean Boulevard, Corona del Mar, Orange County, APN 0052-120-055 (Exhibit 1)
DESCRIPTION OF PROPERTY:	8194-square-foot (0.19-acre) oceanfront lot, immediately inland of Corona del Mar State Beach
PROPERTY OWNER:	George M. McNamee
VIOLATION DESCRIPTION:	<p>Unpermitted grading and landform alteration of a coastal bluff and beach; unpermitted construction of a shed set into the toe of the bluff, a barbeque area, storage cabinets, kitchen and bathroom facilities, two concrete picnic tables/benches and a shade/canopy structure with four posts.</p> <p>Non-compliance with terms and conditions of CDP No. 5-81-257.</p>
SUBSTANTIVE FILE DOCUMENTS:	Cease and desist order file No. CCC-04-CD-02 Coastal Development Permit File No. 5-81-257 Background Exhibits 1 through 27
CEQA STATUS:	Categorically exempt (CEQA Guidelines (CG) §§ 15060(c)(3), 15061(b)(2), 15307, 15308 and 15321)

I. SUMMARY

Staff recommends that the Commission approve and issue Commission Cease and Desist Order No. CCC-04-CD-02 (“Order”) to remove unpermitted development at 3329 Ocean Boulevard, Corona del Mar (“subject property”). The unpermitted development consists of grading and landform alteration of a coastal bluff and beach and unpermitted construction of a shed set into the toe of the bluff, a barbeque area, storage cabinets, kitchen and bathroom facilities, two concrete picnic tables/benches and a shade/canopy structure with four posts. Mr. George McNamee is the owner of the subject property.

The subject property is located in the Corona del Mar area of Newport Beach, immediately inland of Corona del Mar State Beach. The subject property contains a single family home on the bluff top portion of the lot, and a bluff face that cascades down to the sandy beach with a pre-Coastal stairway down the bluff. The unpermitted development is located at the base of the bluff face and on sandy beach portions of the subject property. Regarding coastal planning and development, Newport Beach has a certified Land Use Plan but does not yet have a certified Local Coastal Program.¹ The Commission therefore has jurisdiction for issuing coastal development permits and for enforcing the provisions of the Coastal Act in this area.

The unpermitted activity that has occurred on the subject property meets the definition of “development” set forth in §30106 of the Coastal Act (Public Resources Code). The development was undertaken without a coastal development permit, in violation of Public Resources Code §30600. As discussed further below, it was also undertaken in violation of conditions included in the 1981 CDP issued for the residence on the property. Therefore, the Commission may issue a Cease and Desist Order under §30810 of the Coastal Act. The proposed Cease and Desist Order would require the owners to remove all unpermitted development from the property and to restore and revegetate the toe of the bluff where unpermitted grading or disturbance has occurred.

II. HEARING PROCEDURES

The procedures for a hearing on a proposed cease and desist order are outlined in Section 13185 of the California Code of Regulations (CCR), Title 14, Division 5.5, Chapter 5, Subchapter 8.

For a cease and desist order hearing, the Chair shall announce the matter and request that all parties or their representatives present at the hearing identify themselves for the record, indicate what matters are already part of the record, and announce the rules of the proceeding including time limits for presentations. The Chair shall also announce the right of any speaker to propose to the Commission, before the close of the hearing, any question(s) for any Commissioner, at

¹ The Land Use Plan (LUP) for the City of Newport Beach was effectively certified on May 19, 1982. The certified LUP was updated on January 9, 1990.

his or her discretion, to ask of any other speaker. The Commission staff shall then present the report and recommendation to the Commission, after which the alleged violator(s) or their representative(s) may present their position(s) with particular attention to those areas where an actual controversy exists. The Chair may then recognize other interested persons after which staff typically responds to the testimony and to any new evidence introduced.

The Commission should receive, consider, and evaluate evidence in accordance with the same standards it uses in its other quasi-judicial proceedings, as specified in CCR §13186, incorporating by reference §13065. The Chair will close the public hearing after the presentations are completed. The Commissioners may ask questions to any speaker at any time during the hearing or deliberations, including, if any Commissioner chooses, any questions proposed by any speaker in the manner noted above. Finally, the Commission shall determine, by a majority vote of those present and voting, whether to issue the Cease and Desist Order, either in the form recommended by the Executive Director, or as amended by the Commission. Passage of a motion, per staff recommendation or as amended by the Commission, will result in issuance of the order.

III. MOTION

MOTION: I move that the Commission issue Cease and Desist Order No. CCC-04-CD-02 pursuant to the staff recommendation and adopt all the findings.

STAFF RECOMMENDATION OF APPROVAL:

Staff recommends a **YES** vote. Passage of this motion will result in issuance of the Cease and Desist Order. The motion passes only by an affirmative vote of a majority of Commissioners present.

RESOLUTION TO ISSUE CEASE AND DESIST ORDER:

The Commission hereby issues Cease and Desist Order number CCC-04-CD-02 set forth below and adopts the findings set forth below on grounds that development has occurred without a coastal development permit and is not in compliance with terms and conditions of CDP No. 5-81-257.

IV. PROPOSED FINDINGS

A. Description of Unpermitted Development

The violation consists of grading and landform alteration of a coastal bluff and beach and unpermitted construction of a shed set into the toe of the bluff, a barbeque area, storage cabinets, kitchen and bathroom facilities, two concrete picnic tables/benches and a shade/canopy structure with four posts (**Exhibit 2a-h**).

B. Background and Administrative Resolution Attempts

1. Permit History and Site Photographs

The original single-family residence on the subject property was constructed in 1956, prior to the enactment of the Coastal Act, and so did not require a Coastal Development Permit (CDP). Mr. McNamee purchased the property in 1978. On October 6, 1981, the Commission issued to Mr. McNamee CDP No. 5-81-257 for partial demolition of the existing 2-level single-family residence and remodeling and additions to same, resulting in a 2-level single-family residence with attached 2-car garage, a jacuzzi and decking on a bluff top lot. No other development on the subject property, including the above-referenced unpermitted development, was listed as part of the proposed project description of the application Mr. McNamee submitted on August 27, 1981, shown on the proposed or approved plans, or authorized by the Commission pursuant to its issuance of that permit.

In fact, CDP No. 5-81-257 includes Standard Condition 3 regarding compliance, and states “All construction must occur in strict compliance with the proposal as set forth in the application for permit, subject to any special conditions set forth below. Any deviation from the approved plans must be reviewed and approved by the staff and may require Commission approval.” Because the unpermitted development cited above is not authorized in approved plans, it violates Standard Condition 3 of CDP No. 5-81-257.

The 1981 CDP, which was issued on the Commission’s Consent Calendar, also included Special Condition 1 requiring the submittal of revised plans showing no new development extending seaward of the existing deck. Approved plans in the permit file include this notation and are in accord with this special condition. The only existing development depicted on these plans that is seaward of the decks is a pre-Coastal stairway. Therefore, the unpermitted also development violates Special Condition 1 of the 1981 CDP.

No development is visible at the base of the bluff or on the sandy beach in 1970, 1972, 1978 and 1986 aerial photographs of the subject property (**Exhibit 3a-d**). The Commission has no record of any CDP being issued for the cited development, and as noted, the 1981 CDP specifically prohibited any new development seaward of the existing deck. Some development on the sandy beach portion of the property is visible in a 1993 aerial photograph of the site (**Exhibit 3e**). The Commission’s Mapping/GIS Program has reviewed 1972 and 2002 photographs of the subject property and has commented that no structure or development (other than the pre-Coastal stairway) is visible in the 1972 photograph of the subject property (**Exhibit 4**). The aerial photographs of the subject property indicate that unpermitted development appeared on the beach some time between 1986 and 1993, after the issuance of the 1981 CDP and therefore in violation of Standard Condition 3 and Special Condition 1 of the CDP. The proposed Order would require removal of all of the unpermitted development on the subject property. Based on the resource protection policies of Chapter 3 of the Coastal Act, the unpermitted development is not consistent with the Coastal Act (see discussion in Section D, below) and staff could not recommend approval of an after-the-fact application to retain any of the unpermitted development.

2. Administrative Resolution Attempts

Commission staff first notified Mr. McNamee of the violation on the subject property in a letter dated March 13, 2001 (**Exhibit 5**). In this letter, staff informed Mr. McNamee that an application to retain the unpermitted development would likely be denied, and recommended that Mr. McNamee submit a CDP application for removal of the unpermitted development and restoration of the site. Mr. McNamee failed to submit a CDP application by the May 11, 2001 deadline. In a letter to Commission staff dated June 7, 2001, Mr. McNamee asserted that a previous owner had placed the cited development on the property (**Exhibit 6**). In a letter dated August 31, 2001, staff set a second deadline of September 28, 2001 for submittal of a CDP application, which Mr. McNamee also failed to meet (**Exhibit 7**). In a letter to Commission staff dated September 21, 2001, Mr. McNamee again asserted that a previous owner had placed the cited development on the property (**Exhibit 8**). In a letter dated April 28, 2003, staff indicated that even if a prior owner constructed the development, it couldn't remain on the site in violation of the Coastal Act and that as the legal property owner Mr. McNamee was responsible for resolving the Coastal Act violations on the subject property. Staff set a third deadline of May 29, 2003 for submittal of a CDP application, again recommending that Mr. McNamee apply to remove the unpermitted development and informing Mr. McNamee that staff would consider formal enforcement actions if Mr. McNamee did not resolve the violation administratively (**Exhibit 9**). Mr. McNamee failed to meet this deadline. South Coast District staff subsequently referred Violation File No. V-5-00-050 regarding this matter to Headquarters enforcement staff and recommended initiation of formal enforcement proceedings.

In a letter dated December 10, 2003, Commission staff issued a Notice of Intent (NOI) to commence Cease and Desist Order proceedings (**Exhibit 10**). The NOI set forth the basis for issuance of the proposed Order, stated that the matter was tentatively being placed on the Commission's February 2004 hearing agenda, and provided the opportunity for Mr. McNamee to respond to allegations in the NOI with a Statement of Defense form.

Mr. McNamee did not return the Statement of Defense by the January 7, 2004 deadline.² On January 9, 2004, staff received a letter from Mr. McNamee requesting additional time to respond to the NOI (**Exhibit 11**). In a letter dated January 9, 2004, staff extended the deadline for Mr. McNamee's submittal of a Statement of Defense until January 20, 2004 (**Exhibit 12**). Mr. McNamee failed to meet this deadline. On January 20, 2004, staff received a letter from Mr. McNamee, in which he requested a delay of the proposed enforcement proceedings (**Exhibit 13**). In a letter dated January 20, 2004, staff declined to postpone the proposed enforcement proceedings and granted a second deadline extension to January 26, 2004 for submittal of a Statement of Defense (**Exhibit 14**). On January 22, 2004, staff received a letter from the McNamees stating that they were in the process of selecting an attorney to represent them (**Exhibit 15**).

² The Commission's regulations provide 20 days for submittal of the Statement of Defense (California Code of Regulations, Title 14, §13181).

In a letter dated January 26, 2004, staff received a letter from the McNamee's attorney, requesting an extension for their submittal of a Statement of Defense on behalf of the McNamees and requesting to review photographs staff cited regarding the issue of unpermitted development on the subject property (**Exhibit 16**). In a letter dated January 26, 2004, staff granted a third extension for submittal of a Statement of Defense, setting a deadline of February 9, 2004 (**Exhibit 17**). In a letter dated January 30, 2004, staff provided copies of photographs to the McNamee's attorney in response to his request to review photographs (**Exhibit 18**). Staff received a Statement of Defense on February 9, 2004 (**Exhibit 19**).

The February 9, 2004 cover letter that accompanied the submittal of the Statement of Defense requested that the proposed enforcement matter be heard at the Commission's April 2004 hearing and requested to review the related Violation File for this matter (**Exhibit 20**). In a letter dated February 11, 2004, staff responded to these requests (**Exhibit 21**). Commission staff provided all non-exempt public records regarding the alleged violations to the McNamees on February 11, 2004. In a letter dated February 24, 2004, staff received a second request regarding review of the Violation File (**Exhibit 22**), and staff responded in a letter dated March 1, 2004 (**Exhibit 23**).

The February 9, 2004 Statement of Defense noted that the development on the subject property includes kitchen and bathroom facilities on the sandy beach portion of the subject property. Staff did not learn of the existence of this unpermitted development until the February 9, 2004 submittal of a Statement of Defense. Staff consequently mailed a supplemental Notice of Intent (NOI) letter to the McNamees on February 13, 2004, providing formal notice regarding this additional unpermitted development (**Exhibit 24**). Staff included a supplemental Statement of Defense form with the February 13 NOI to provide the McNamees with the opportunity to respond to allegations regarding the unpermitted kitchen and bathroom facilities, and set a deadline of March 8, 2004 for its submittal. Staff received a supplemental Statement of Defense on March 11, 2004 (**Exhibit 25**). The March 11, 2004 cover letter that accompanied the submittal of the supplemental Statement of Defense asserted that the Commission was denying the McNamees due process (**Exhibit 26**). Staff responded to this assertion in a letter dated March 15, 2004 (**Exhibit 27**).

C. Basis for Issuance of the Cease and Desist Order

The statutory authority for issuance of this Cease and Desist Order is provided in §30810 of the Coastal, which states, in relevant part:

- (a) If the Commission, after public hearing, determines that any person...has undertaken, or is threatening to undertake, any activity that... requires a permit from the Commission without securing the permit or is inconsistent with any permit previously issued by the Commission, the Commission may issue an order directing that person...to cease and desist.*
- (b) The cease and desist order may be subject to such terms and conditions as the Commission may determine are necessary to ensure compliance with this division, including immediate removal of any development or material...*

The unpermitted activity that has occurred on the subject property meets the definition of “development” set forth in §30106 of the Coastal Act (Public Resources Code). The development was undertaken without a coastal development permit, in violation of Public Resources Code §30600. Aerial photographs indicate that the development did not exist prior to the Coastal Act and post-dates CDP No. 5-81-257 and is also in violation of the requirements of the conditions of this permit. Therefore, the Commission may issue a Cease and Desist Order under §30810 of the Coastal Act.

D. Inconsistency with Chapter 3 of the Coastal Act and Newport Beach Land Use Plan

As discussed above, the Commission may issue a Cease and Desist Order under §30810 of the Coastal Act for the unpermitted development on the subject property. A showing of inconsistency with Chapter 3 or the local Land Use Plan is not required for Orders to be issued under §30810, but we provide this information for background purposes.

1. Scenic Resources

Section 30251 of the Coastal Act pertains to scenic and visual resources. It states:

The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas.

The subject property is located along a bluff face immediately adjacent to Corona del Mar State Beach. Corona del Mar State Beach is a public beach that serves as a popular visitor destination point for recreational uses. Several hundred feet southeast (five properties down coast) of the subject property is a public bluff park known as Inspiration Point, which has a public access way from Inspiration Point to the beach below. The unpermitted development on the subject property is visible from the sandy beach and bluff park (**Exhibit 2g**).

The general pattern of development along this segment of Ocean Boulevard is such that structures are sited at the top of the bluff, while the bluff face remains largely undisturbed and vegetated except for some private bluff stairways that exist in the area, including a pre-Coastal stairway on the subject property. The unpermitted development on the subject property is inconsistent with Section 30251 because the shed, barbeque area, storage cabinets, kitchen and bathroom facilities, two concrete picnic tables/benches and a shade/canopy structure with four posts adversely affect public views of the vegetated bluff and beach area from the adjacent public beach and do not minimize the alteration of natural land forms. The unpermitted development has resulted in a very visible intensification of use of the site as compared with its undeveloped state. The unpermitted development includes signs that read “George’s Beach”

and “Private Shower”, which effectively discourage the public from using the adjacent public beach because of the perception of privatization (**Exhibit 2e and 2f**).

In addition, over time, incremental impacts from development can have a significant cumulative adverse impact, including visual impacts. If the unpermitted development is not removed, applicants in the vicinity could begin to request similar new construction on the bluff face an/or at the toe of the bluff slope, thus contributing cumulatively to adverse visual impacts. Therefore, staff recommends the issuance of the proposed Order to remove unpermitted development to protect views of the bluff and beach from the adjacent public beach and to minimize landform alteration.

2. Public Access and Development Adjacent to Recreation Areas

Section 30211 of the Coastal Act contains policies regarding public access to the shoreline. Section 30240 of the Coastal Act addresses appropriate development adjacent to a recreation area.

Section 30211 states:

Development shall not interfere with the public’s right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.

Section 30240(b) states:

Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.

The unpermitted development subject to this order is located on the sandy beach and the adjacent bluff slope adjacent to Corona del Mar State Beach. Corona del Mar State Beach is a public beach that serves as a popular visitor destination point for recreational uses. Several hundred feet southeast (five properties down coast) of the subject property is a public bluff park known as Inspiration Point, which has a public access way from Inspiration Point to the beach below. The unpermitted development on the subject property is highly visible from the sandy beach and bluff park.

The unpermitted development is inconsistent with Sections 30211 and 30240 because its presence encroaches seaward and discourages public use of the adjacent sandy beach. In addition to the direct occupation of sandy beach near the toe of the bluff, the unpermitted development has resulted in a very visible intensification of use of the site as compared with its undeveloped state, and effectively discourages the public from using the adjacent public beach located seaward of the unpermitted development because of the perception of privatization of

the entire area (**Exhibit 2a-g**). Beach-goers are less likely to utilize a segment of the beach that is physically restricted by a neighboring private property owner. The presence of the unpermitted development adversely affects the public's continued use of the beach.

3. Bluff Slope Development/Geologic Stability

Section 30253 of the Coastal Act pertains to minimizing adverse impacts of development. Section 30253(2) states:

New development shall assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.

In this case, the unpermitted development is inconsistent with Section 30253 because the unpermitted development at the base of the bluff has substantially altered the natural landform where the shed is set into the toe of the bluff (**Exhibit 2d-f**). The unpermitted grading and development has resulted in the removal of the previously existing bluff vegetation to the right of the stairway, and has cut into the base of the bluff where the shed is set into the toe of the bluff to the left of the stairway. These alterations can contribute to increased erosion and instability. Aerial photographs of the subject property indicate that unpermitted development appeared on the beach some time between 1986 and 1993.

4. Newport Beach Land Use Plan

The City of Newport Beach Land Use Plan (LUP) was certified on May 19, 1982 and updated on January 9, 1990. While the Coastal Commission retains jurisdiction for permitting and enforcement matters in Newport Beach, the LUP provides additional guidance and includes the following policy related to the unpermitted development on the subject property.

Development of Coastal Bluff Sites, Policy 2(b) states:

Public Views. The location and design of a proposed project shall take into account public view potential.

Grading, cutting and filling of natural bluff face or bluff edges shall be prohibited in order to preserve the scenic value of bluff areas, except for the purpose of performing emergency repairs, or for the installation of erosion-preventive devices or other measures necessary to assure the stability of the bluffs.

The unpermitted development is inconsistent with the LUP because it is apparent that the base of the bluff face has been altered where a shed and other development were installed (**Exhibit 2a, 2d and 2f**) and neither of the exceptions in the LUP (emergency repairs and erosion-

preventive devices) applies. The scenic value of the previously undisturbed and vegetation bluff face has been disturbed.

E. California Environmental Quality Act (CEQA)

The Commission finds that issuance of a Cease and Desist Order to compel the removal of the unpermitted development and restoration of the property is exempt from any applicable requirements of the California Environmental Quality Act (CEQA) of 1970 and will not have significant adverse effects on the environment, within the meaning of CEQA. The Cease and Desist Order is exempt from the requirement for the preparation of an Environmental Impact Report, based on Sections 15060(c)(3), 15061(b)(2), 15307, 15308 and 15321 of the CEQA Guidelines.

F. Allegations

The Commission alleges the following:

1. Mr. George McNamee is the owner of the property located at 3329 Ocean Boulevard, Corona del Mar, CA, APN 0052-120-055.
2. Unpermitted development consisting of grading and landform alteration of a coastal bluff and beach and construction of a shed set into the toe of the bluff, a barbeque area, storage cabinets, kitchen and bathroom facilities, two concrete picnic tables/benches and a shade/canopy structure with four posts has occurred on the subject property.
3. No exemption from the permit requirements of the Coastal Act applies to the unpermitted development on the subject property.
4. In letters dated March 13, 2001, August 31, 2001, and April 28, 2003, Commission staff informed Mr. McNamee that development had occurred on the subject property without benefit of a CDP and constitutes an ongoing violation of the Coastal Act.
5. The unpermitted development violates conditions of CDP No. 5-81-257.
6. Staff has explained to Mr. McNamee that it could not recommend after-the-fact approval of the unpermitted development. Commission staff has directed Mr. McNamee to apply for a CDP to remove the unpermitted development on the subject property and to restore the bluff face. Mr. McNamee has failed to do so.

The following section presents defenses set forth by Mr. McNamee in his February 9 and March 11, 2004 Statements of Defense and the Commission's response to each defense.

E. Violator's Defense and Commission Response

Owner's Defense:

1. The McNamees deny that they have performed any grading on the property other than the grading approved in connection with the reconstruction of the residence under Coastal Development Permit No. 5-81-257.

Commission's Response:

Photographs of the subject property indicate that the base of the bluff face has been altered where a shed and other development were installed (**Exhibit 2a, 2d and 2f**). None of the cited development is visible on the beach or at the base of the bluff in 1970, 1972, 1978 and as late as 1986; some development is visible on the subject property in a 1993 aerial photograph (**Exhibit 3a-e**).

Owner's Defense:

2. The McNamees assert that at the time they bought the property in 1978, a shed, barbeque, storage lockers and picnic tables existed on the sandy beach portion of their property. "At the time the McNamees acquired the property in 1978, the shed appeared to be not less than 10 years old and was in a deteriorated condition. Between 1978 and the present date the McNamees have repaired and maintained the shed but have not done any grading of the property. Inside of the shed were both a sink and a toilet area. These facilities were connected to the main sewer connection from the main residence which was installed in 1956 and goes from the main residence to a City maintained sewer pipe located in Breakers Way, southwest of the McNamee property...Over the past 25 years the McNamees have repaired and replaced storage lockers and the barbeque and have replaced tables on the beach. The most recent replacement of tables was with concrete tables... All of the repair, maintenance and replacement which the McNamees have done has been conducted entirely on their private property and entirely without the use of any mechanized equipment. All of these activities are exempt from the permit requirements of the Coastal Act under Public Resources Code §30610(d)."

Commission's Response:

The Commission has received no evidence from the McNamees that the cited development was present on the subject property when they bought it in 1978. Photographs of the subject property indicate otherwise; no development other than the pre-Coastal stairway is visible in 1970, 1972, 1978 and 1986 aerial photographs of the subject property (**Exhibit 3a-d**). The City of Newport Beach and the Commission have no records of any building permits or CDPs being issued for the cited development. There is no record of local government approval for a bathroom and/or septic system on the beach.

The Commission also does not agree with the McNamee's assertion that the cited development is an existing improvement to the single-family residence that is exempt from permit requirements under the repair and maintenance section of the Commission's regulations (§13252). Rather, staff believes that the unpermitted development required a CDP under §13250(b) of the Commission's regulations, which state:

*"Pursuant to Public Resources Code Section 30610(a), the following classes of development require a coastal development permit because they involve a risk of adverse environmental effects: (1) Improvements to a single-family structure if the structure or improvement is located: **on a beach**, in a wetland, seaward of the mean high tide line, in an environmentally sensitive habitat area, in an area designated as highly scenic in a certified land use plan, **or within 50 feet of the edge of a coastal bluff**. (2) Any significant **alteration of natural land forms** including removal or placement of vegetation, **on a beach**, wetland, or sand dune, or within 50 feet of the edge of a coastal bluff, or in environmentally sensitive habitat areas (3) the **expansion or construction of water wells or septic systems**."* (emphasis added)

In addition to meeting the definition of "development" set forth in §30106 of the Coastal Act (Public Resources Code), the unpermitted development is located on a beach and has altered natural landforms and therefore is subject to the permit requirements of the Coastal Act as set forth in §30610(a) of the Coastal Act and §13250(b) of the implementing regulations.

Owner's Defense:

3. "The delay of more than 20 years by the Coastal Commission in bringing enforcement proceedings has prejudiced the McNamees to their detriment and the Commission should decline to enforce because of the prejudice caused by its own inaction. The delay by the Coastal Commission in alleging that the improvements on the McNamee property are unpermitted and subject to removal has been unreasonable and caused prejudice to the McNamees."

Commission's Response:

The length of time that unpermitted development has existed has no bearing on enforcement of the permit requirements of the Coastal Act. The Commission's enforcement program prioritizes and responds to violations as they are brought to its attention. The Commission first learned of this violation in September 2000 and sent formal notice to Mr. McNamee in March 2001. Since that time, staff repeatedly attempted to resolve this violation administratively before initiating formal enforcement proceedings in December 2003.

The assertion of unreasonable delay and prejudice implies a defense based on the doctrine of laches. The doctrine of laches does not apply in this case. It is well settled that the equitable defense of laches "will not ordinarily be invoked to defeat policy adopted for the public

protection” (*City of San Francisco v. Pacello* (1978) 85 Cal.App.3d 637, 646.³) In this case, the cease and desist order proceedings were initiated to bring the subject violations into compliance with the Coastal Act, which was adopted to protect coastal resources for the benefit of the public.

Even if the doctrine were applicable to this proceeding, it is well established that “laches is an equitable defense that requires *both* unreasonable delay *and* prejudice resulting from the delay. The party asserting and seeking to benefit from the laches bar bears the burden of proof on these factors.” (*Mt. San Antonio Comm. Coll. Dist. v. Pub. Emp. Rel. Bd.* (1989) 210 Cal.App.3d 178.) Mr. McNamee has contributed to delay in this proceeding, because prior to the commencement of formal enforcement proceedings, Mr. McNamee failed to meet three deadlines over more than two years for the submittal of a CDP application regarding the unpermitted development. After the commencement of formal enforcement proceedings and at Mr. McNamee’s request, staff has extended deadlines three times for the submittal of a Statement of Defense, which has further delayed this proceeding. Mr. McNamee cannot show any prejudice from the Commission’s failure to bring this action at any earlier date; in fact, Mr. McNamee has actually benefited from many years of use of the unpermitted structures.

Owner’s Defense:

4. “The McNamees have made no use of their property which is dissimilar to the manner in which others have used their similar property including the State of California which owns the adjoining Corona del Mar State Beach.”

Commission’s Response:

In past permit and enforcement actions for similar nearby private properties, the Commission has denied an application for after-the-fact authorization of unpermitted development on the beach (Butterfield CDP No. 5-01-199; litigation is currently pending in this case), and has reached a settlement with another property owner who has agreed to remove unpermitted development from the beach (Battram CCC-04-CD-01). The proposed Cease and Desist Order is consistent with recent Commission actions regarding similar cases of unpermitted development.

Owner’s Defense:

5. “The Commission may not use the Cease and Desist Order Provisions of Public Resources Code §30810 to force a new property owner to restore property alleged to be altered by his predecessor.”

Commission’s Response:

³ Accord: *Morrison v. California Horse Racing Board* (1988) 205 Cal.App.3d 211, 219 (“Where there is no showing of manifest injustice to the party asserting laches, and where application of the doctrine would nullify a policy adopted for the public protection, laches may not be raised against a governmental agency.”)

The photographic evidence indicates that the unpermitted development occurred after Mr. McNamee acquired the property in 1978. As discussed in Section B of the staff report and in Commission's Response to Defense #2, photographs of the subject property indicate that none of the cited development is visible on the beach or at the base of the bluff in 1970, 1972, 1978 and as late as 1986; some development is visible on the subject property in a 1993 aerial photograph (**Exhibit 3a-e**). Photographs indicate that development appeared on the beach and base of bluff portion of the subject property after McNamees became owners of the property. Moreover, approved plans for the 1981 remodel CDP issued to Mr. McNamee indicate no existing development seaward of the house other than a pre-Coastal stairway. Because the unpermitted development cited above is not authorized in approved plans, it violates Standard Condition 3 of CDP No. 5-81-257. This permit also included a special condition prohibiting any new development seaward of the decks, and no permits from City of Newport Beach or Coastal Commission have been applied for or issued for any of the cited development on the beach and base of bluff portions of the subject property. These permit requirements clearly apply to Mr. McNamee.

Regardless of who performed the development, the persistence of the unpermitted development remains a continuing violation of the Coastal Act and a continuing public nuisance that the current owner is liable for correcting (*Leslie Salt Co. v. San Francisco Bay Conservation etc. Com.* (1984) 153 Cal. App.3d 605, 618). In *Leslie Salt* (p. 622), the court held that:

“whether the context be civil or criminal, liability and the duty to take affirmative action [to correct a condition of noncompliance with applicable legal requirements] flow not from the landowner’s active responsibility for [that] condition of his land...or his knowledge of or intent to cause such [a condition] but rather, and quite simply, from his very possession and control of the land in question.”

In addition, the Coastal Act represents a legislative declaration that acts injurious to the state's natural resources constitute a public nuisance. (*Leslie Salt Co. v. San Francisco Bay Conservation etc. Com.* (1984) 153 Cal. App.3d 605, 618; *CREED v. California Coastal Zone Conservation Com.* (1974) 43 Cal.App.3d 306, 318.) The Coastal Act is a “sensitizing of and refinement of nuisance law.” (*CREED*, at 319.)

Mr. McNamee is liable for actions of previous owners who may have created the public nuisances on the subject property based on Civil Code 3483, which states:

Every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of, such property, created by a former owner, is liable therefor in the same manner as the one who first created it.

Thus, even if a prior owner constructed the unpermitted development, Mr. McNamee's maintenance of that development without a permit constitutes a continuing violation of the Coastal Act. Moreover, all of the unpermitted development appears to have been put there after Mr. McNamee purchased the property. The Commission is authorized under Section 30810 of the Coastal Act to order removal of the unpermitted development.

Owner's Defense:

6. "The McNamees have a right to use their home and their private property for reasonable uses which cause no harm to the environment or to the public. The improvements which have been constructed to facilitate those uses are modest and unassuming. No fences signs or other indicators exist which suggest that the public should not be in the vicinity of McNamee property and have never existed."

Commission's Response:

The Commission does not have to establish that there has been harm to people or the environment for it to enforce violations of the Coastal Act. In *Ojavan Investors, Inc. v. California Coastal Commission* (1987) 54 Cal.App.4th 373, the Court of Appeal ruled that, even though there was "very little or no physical damage to the properties involved," a judgment for injunctive relief and civil fines should be upheld,

in light of the public interest goals of the TDC (transfer development credits) program, the need for uniform compliance with the program so as to further the Coastal Act's objectives to protect the coast, and appellants' blatant disregard of the deed restrictions.

Moreover, in many cases, after a complete application for a CDP is filed, the Commission reviews the consistency of proposed development with the standards and policies of the Coastal Act. In this particular case, as discussed in Section IV.D of these findings, staff has determined that Mr. McNamee's unpermitted development appears to be inconsistent with several Chapter 3 policies of the Coastal Act and thus, could potentially be causing adverse impacts to coastal resources.

In addition, as discussed in Section D2 of the staff report, the public resources of access and recreation are in fact endangered by the unpermitted development, because it encroaches seaward and adversely affects the public's continued use of the beach. The unpermitted development has resulted in a visible intensification of use of the site as compared with its undeveloped state, and effectively discourages the public from using the adjacent public beach because of the perception of privatization. Contrary to the statement in Defense #6, signs reading "George's Beach" and "Private Shower" are posted on and near the unpermitted development, which suggests that the public should not be in the vicinity of the subject property (**Exhibit 2e-f**). Beach-goers are less likely to utilize a segment of the beach that is physically restricted by a neighboring private property owner.

In addition, the development adversely affects other public resources protected by the Coastal Act, such as protection of scenic resources, bluff stability and compliance with the Coastal Act policies of the LUP (see further discussion in Section D of the staff report).

Finally, whether or not the unpermitted development is causing any harm, all of the cited development is unpermitted, and the Commission has the authority to order its removal on that basis alone under Section 30810 of the Coastal Act.

Owner's Defense:

7. "The Coastal Commission is unconstitutionally constituted. A majority of the members of the Coastal Commission are appointed by members of the State Legislature and not by the Governor. Such appointment authority places the Coastal Commission under the control of the State Legislature in violation of the separation of powers required by California Constitution, Article III, §3. As such the Coastal Commission should be enjoined from acting on permits and cease and desist orders. This issue is presently pending in the California Supreme Court in the case of *Marine Forests Society v. California Coastal Commission*, Docket No. S113466.

Commission's Response:

Mr. McNamee cites the pending CA Supreme Court case, *Marine Forests Society v. California Coastal Commission*, Docket No. S113466. Since the Supreme Court is hearing the case, the Court of Appeal's ruling in the case is depublished and has no legal effect. Mr. McNamee asserts that the appointment by the Legislature of a majority of Commissioners violates the separation of powers required by the California Constitution. The Commission believes that under the California Constitution and cases interpreting it, the current appointment structure of the Commission is constitutional. Unless and until there is a Court of Appeals decision directing otherwise, the Commission is required to continue implementing the Coastal Act. In response to the Court of Appeal's decision in the Marine Forests case, the Legislature amended the Coastal Act to address the constitutional problem the Court identified, by having the Commissioners who are appointed by legislators serve for fixed, four year terms.

Owner's Defense:

8. "Coastal Commission Regulations limiting the improvements which can be made to single family homes are invalid. The Coastal Act of 1976 exempted improvements to existing single family residences from the permit requirements of the Coastal Act. Public Resources Code §30610(a). The Coastal Commission adopted a regulation in 1977 seeking to limit the application of this provision to require permits for certain improvements and for residences in certain locations. California Code of Regulations, Title 14, §13250. The adoption of such regulation was invalid. The Coastal Commission, at the time of its adoption in 1977 and at the time of each subsequent amendment to §13250 (the last of which was in 1999) was an unconstitutionally constituted agency..."

Commission's Response:

This defense argues that because of the previously raised defense, which asserted that the Commission is unconstitutionally constituted, its adoption of and amendments to its regulations (California Code of Regulations, Title 14, Division 5.5) were invalid. The Commission does

not agree that its regulations are invalid and no court has invalidated the Commission's regulations. See Commission's Response to Defense #8, above.

Owner's Defense:

9. "The Coastal Commission's Cease and Desist Order Proceedings deny due process to the McNamees...The Coastal Commission is not an unbiased trier of fact...The members of the Coastal Commission are not presented with all of the evidence which may be submitted in favor of a person accused of a violation but only a summary of that evidence compiled by its Executive Director."

Commission's Response:

Mr. McNamee asserts that the hearing procedures deny due process and constitute a "taking." Ordering removal of the unpermitted development on the beach would not be "taking" because even without those amenities on the beach, Mr. McNamee has residential use of his property and the existing residence on his property has significant economic value.

Contrary to his assertion, Mr. McNamee has obtained all evidence in the Commission's possession regarding the issue of whether or not there is illegal development on his property. As explained in a letter to Mr. McNamee's counsel dated March 15, 2004, the only records that Commission staff withheld were records created by Commission staff that contain staff deliberations or enforcement strategies. These records are not "evidence."

At the hearing, any witnesses who wish to present evidence on Mr. McNamee's behalf may do so. Alternatively, Mr. McNamee may submit a letter or statement from any witness who is unable or unwilling to attend the hearing. While Commission staff may summarize the evidence that an alleged violator submits for the convenience of the Commission and the public, the Commissioners also receive a complete copy of the documents/evidence submitted by the alleged violator, including the Statement of Defense, all exhibits attached to the Statement, as well as any letters or statements from witnesses or consultants or photographic evidence. Although Commission hearing procedures do not provide for cross examination of Commission staff, Mr. McNamee may present to Commissioners any evidence he has indicating that the Executive Director's legal or factual conclusions in the matter are wrong and may explain any perceived flaws in the evidence. Contrary to Mr. McNamee's assertion, there is no evidence that the Commissioners are biased, and it is not a denial of due process for Commissioners to decide this matter.

Accordingly, Mr. McNamee has not identified any failure to provide due process.

Owner's Defense:

10. "The Coastal Commission is required by the Americans with Disabilities Act to adjust its policies, practices and procedures to accommodate the disability of George McNamee. George McNamee suffers from heart conditions...and proclivity to

melanoma. Due to the heart condition, Mr. McNamee cannot lift or carry heavy objects or repeatedly climb stairs. Due to the skin condition Mr. McNamee cannot endure exposure to the sun for extended periods of time. If the Coastal Commission forcibly compels Mr. McNamee to remove these accommodations [the unpermitted development], he is unable to use his home for the purposes for which it is suited and for which he has used it for the past 27 years. This would constitute a violation of the Americans with Disabilities Act. 42 U.S.C. §12131(2).”

Commission’s Response:

The Americans With Disabilities Act does not exempt Mr. McNamee from the requirements of the Coastal Act that apply to all other property owners in the coastal zone. The issuance of an order that requires compliance with the permit requirements and resource protection policies of the Coastal Act, does not deny Mr. McNamee “the benefits of services, programs, or activities of a public entity” (42 U.S.C. section 12132). Nor is he being subject to discrimination by the Commission. The motivation for issuance of the proposed Cease and Desist Order is the Commission’s duty under the Coastal Act to protect coastal resources for the benefit of the public. The Commission has no discriminatory purpose. Although the Order will require removal of the private recreational amenities on Mr. McNamee’s property, these amenities are not government benefits, services, programs or activities and therefore, there is no violation of the Americans With Disabilities Act. As explained herein, the development on Mr. McNamee’s property is not exempt from the coastal development permit requirements of the Coastal Act and does not meet the applicable standards for issuance of such a permit. Thus, Mr. McNamee is not a “qualified individual with a disability” under the Act because he is not an individual with a disability who “meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” (42 U.S.C. Section 12131(2)).

Staff recommends that the Commission issue the following Cease and Desist Order:

CEASE AND DESIST ORDER CCC-04-CD-02

Pursuant to its authority under PRC § 30810, the California Coastal Commission hereby authorizes and orders George McNamee, all his employees, agents, and contractors, and any persons acting in concert with any of the foregoing (hereinafter, “Respondents”) to cease and desist from: (1) continuing to maintain any development on his property that violates the California Coastal Act and the requirements of the conditions to CDP No. 5-81-257; and (2) engaging in any further development activity on his property without first obtaining a coastal development permit which authorizes such activity. Accordingly, all persons subject to this order shall fully comply the following conditions:

- A. Within 60 days of issuance of the Cease and Desist Order, Respondents shall submit, for the review and approval of the Executive Director, two sets of a Removal and Restoration Plan prepared by a licensed landscape architect or qualified restoration specialist. The plan shall provide for the removal of all unpermitted development including the existing shed set into the toe of the bluff; a barbeque area, storage cabinets, kitchen, bathroom facilities and related utility/sewage lines, two concrete picnic tables/benches and a shade/canopy structure with four posts, from the subject property. The Removal and Restoration Plan shall also include a grading plan to restore the toe of the bluff where unpermitted grading or disturbance has occurred. Disturbed or graded areas of the toe of the bluff shall be restored to match the existing topography of the immediately adjacent undisturbed bluff slope areas. The Removal and Restoration plan shall also include a revegetation and erosion control plan to revegetate the portion of the bluff slope where grading and disturbance has occurred. The revegetation and erosion control plan shall include the following criteria:
 - (1) An interim erosion control plan that provides for temporary erosion control measures such as geofabrics, silt fencing, sandbag barriers, or other measures to control erosion until revegetation of the restored slope is completed. These erosion control measures shall be required on the project site prior to and concurrent with the initial grading operations and shall be maintained throughout the process to minimize erosion and sediment to runoff waters during construction. All sediment shall be removed to an appropriate disposal site, approved by the Executive Director, either outside the coastal zone or to a site within the coastal zone permitted to receive fill.
 - (2) A revegetation program prepared by a licensed landscape architect or qualified restoration specialist with credentials acceptable to the Executive Director that utilizes only drought-tolerant plant species native to coastal Orange County, and are consistent with the surrounding native plant community.
- B. Within 30 days after approval of the Removal and Restoration Plan by the Executive Director, Respondents shall:

- (1) Remove all unpermitted development, including the existing shed set into the toe of the bluff; a barbeque area, storage cabinets, kitchen, bathroom facilities and related utility/sewage lines, two concrete picnic tables/benches and a shade/canopy structure with four posts, from the subject property; and
 - (2) Complete all restorative grading consistent with the approved Removal and Restoration Plan; and
 - (3) Revegetate all disturbed and graded areas of the bluff slope consistent with the approved Removal and Restoration Plan.
- C. Within 60 days after approval of the Removal and Restoration Plan by the Executive Director, Commission staff will conduct a site visit to confirm compliance with the terms and conditions of the order.

PERSONS SUBJECT TO THE ORDER

Mr. George McNamee, all his employees, agents, and contractors, and any persons acting in concert with any of the foregoing.

IDENTIFICATION OF THE PROPERTY

The property that is the subject of this cease and desist order is described as follows:

3329 Ocean Boulevard, Corona del Mar, CA, APN 0052-120-055.

DESCRIPTION OF UNPERMITTED DEVELOPMENT

Unpermitted grading and landform alteration of a coastal bluff and beach and unpermitted construction of a shed set into the toe of the bluff; a barbeque area, storage cabinets, kitchen and bathroom facilities, two concrete picnic tables/benches and a shade/canopy structure with four posts.

EFFECTIVE DATE AND TERMS OF THE ORDER

The effective date of this order is April 14, 2004. This order shall remain in effect permanently unless and until rescinded by the Commission.

FINDINGS

This order is issued on the basis of the findings adopted by the Commission on April 14, 2004, as set forth in the attached document entitled "Findings for Cease and Desist Order No. CCC-04-CD-02."

COMPLIANCE OBLIGATION

Strict compliance with this order by all parties subject thereto is required. Failure to comply strictly with any term or condition of this order including any deadline contained in this order as approved by the Commission will constitute a violation of this order and may result in the imposition of civil penalties of up to six thousand dollars (\$6,000) per day for each day in which such compliance failure persists. Deadlines may be extended by the Executive Director for good cause. Any extension requests must be made in writing to the Executive Director and received by Commission staff at least 10 days prior to expiration of the subject deadline.

DEADLINES

Deadlines may be extended by the Executive Director for good cause. Any extension request must be made in writing to the Executive Director and received by Commission staff at least 10 days prior to expiration of the subject deadline.

APPEAL

Pursuant to PRC § 30803(b), any person or entity against whom this order is issued may file a petition with the Superior Court for a stay of this order.

Executed in Santa Barbara on April 14, 2004, on behalf of the California Coastal Commission.

Peter Douglas, Executive Director

Exhibits

1. Locus map for the subject property.
2. September 2002 and February 2004 photographs of the subject property.
3. Aerial photographs of the subject property in 1970, 1972, 1978, 1986 and 1993.
4. Photo interpretation for 3329 Ocean Boulevard.
5. Letter dated March 13, 2001, from Commission staff to Mr. McNamee.
6. Letter dated June 7, 2001, from Mr. McNamee to Commission staff.
7. Letter dated August 31, 2001, from Commission staff to Mr. McNamee.
8. Letter dated September 21, 2001, from Mr. McNamee to Commission staff.
9. Letter dated April 28, 2003, from Commission staff to Mr. McNamee.
10. Letter dated December 10, 2003, from Commission staff issuing a Notice of Intent (NOI) to commence Cease and Desist Order proceedings.
11. Letter dated January 9, 2004, from Mr. McNamee to Commission staff, requesting additional time to respond to the NOI.
12. Letter dated January 9, 2004, from Commission staff to Mr. McNamee, extending deadline for submittal of Statement of Defense until January 20, 2004.
13. Letter received January 20, 2004, from Mr. McNamee to Commission staff, requesting a delay of the proposed enforcement proceedings.
14. Letter dated January 20, 2004, from Commission staff to Mr. McNamee, extending deadline for submittal of Statement of Defense until January 26, 2004.
15. Letter received January 22, 2004, from Mr. McNamee to Commission staff.
16. Letter dated January 26, 2004, from Mr. McNamee's attorney to Commission staff.
17. Letter dated January 26, 2004, from Commission staff to Mr. McNamee's attorney, extending deadline for submittal of Statement of Defense until February 9, 2004.
18. Letter dated January 30, 2004, from Commission staff to Mr. McNamee's attorney, responding to attorney's request to view photographs of the subject property.
19. Statement of Defense dated February 9, 2004, received on February 9, 2004.
20. Letter dated February 9, 2004, from Mr. McNamee's attorney to Commission staff, requesting delay of hearing and to review the Violation File.
21. Letter dated February 11, 2004, from Commission staff to Mr. McNamee's attorney, responding to attorney's requests regarding hearing date and Violation File.
22. Letter dated February 24, 2004, from Mr. McNamee's attorney to Commission staff, with second request regarding review of the Violation File.
23. Letter dated March 1, 2004, from Commission staff to Mr. McNamee's attorney, responding to attorney's second request regarding Violation File.
24. Letter dated February 13, 2004, from Commission staff issuing a supplemental Notice of Intent (NOI) to commence Cease and Desist Order proceedings.
25. Supplemental Statement of Defense dated March 11, 2004, received on March 11, 2004.
26. Letter dated March 11, 2004, from Mr. McNamee's attorney to Commission staff, asserting that the Commission was denying the McNamees due process.
27. Letter dated March 15, 2004, from Commission staff to Mr. McNamee's attorney, responding to March 11, 2004 letter.



Exhibit 2a. February 2004 photograph of unpermitted shed, barbeque area, storage cabinets, concrete picnic tables and benches, and shade/canopy structure on subject property. Shed to the left of the stairway is set into graded toe of bluff; vegetation has been removed from the toe of bluff to the right of the stairway.



Exhibit 2b. February 2004 photograph of unpermitted storage cabinets, barbeque area, concrete picnic table and benches, and shed on subject property. Property owner has indicated that kitchen and bathroom facilities are located in the shed.



Exhibit 2c. February 2004 photograph of unpermitted storage cabinets, concrete picnic table and benches, and shade/canopy structure on subject property. Vegetation has been removed from toe of bluff.



Exhibit 2d. February 2004 photograph of unpermitted shed, barbeque area, storage cabinets, concrete picnic tables and benches, and shade/canopy structure on subject property. Shed to the left of the stairway is set into graded toe of bluff; vegetation has been removed from toe of bluff to the right of the stairway.



Exhibit 2e. February 2004 photograph of unpermitted development on subject property. Arrow is pointing at sign on shed that reads “George’s Beach”.



Exhibit 2f. February 2004 photograph of unpermitted development on subject property. Arrow is pointing at sign that reads “Private Shower”.



Exhibit 2g. February 2004 photograph of subject property taken from Inspiration Point, a public access and viewing area five properties down coast of the subject property. Arrows are pointing at unpermitted shed, picnic tables, canopy structure and storage cabinets that are visible to left and right of staircase.



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Exhibit 2h. September 2002 photograph of subject property.

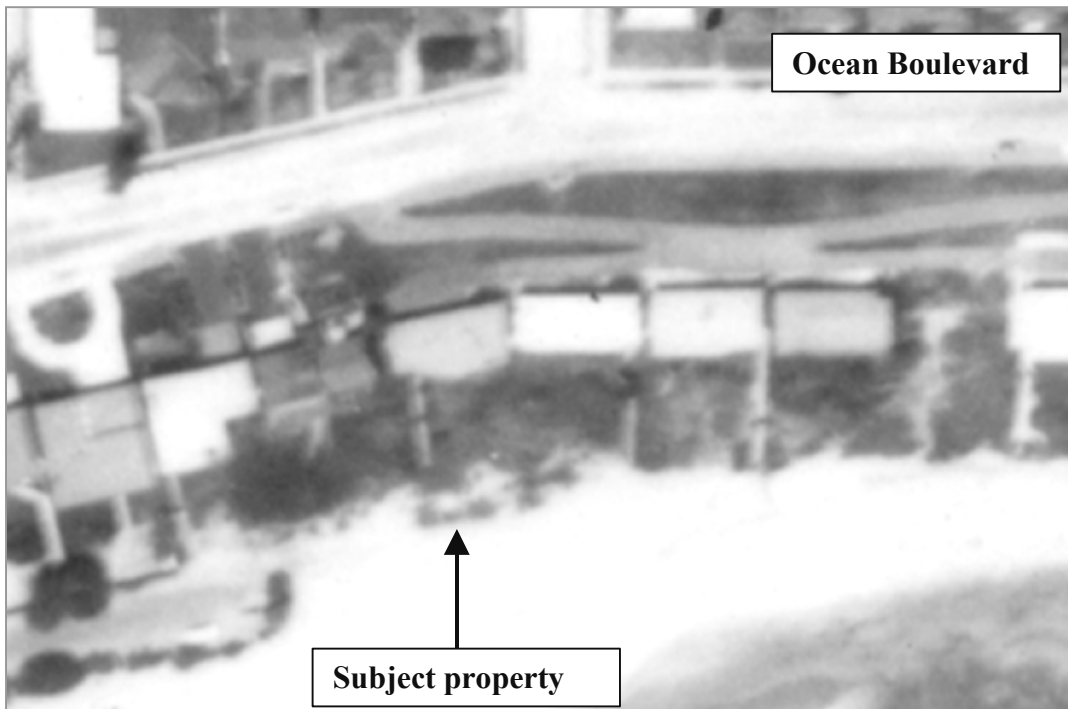


Image 76-1-264, Dept. of Navigation and Ocean Development (now Dept. of Boating and Waterways), April/May 1970.

Exhibit 3a. 1970 photograph of subject property. No development visible at base of bluff or on sandy beach portion of subject property.



Image 723939, Dept. of Navigation and Ocean Development (now Dept. of Boating and Waterways), 1972.

Exhibit 3b. 1972 photograph of subject property. No development visible at base of bluff or on sandy beach portion of subject property.

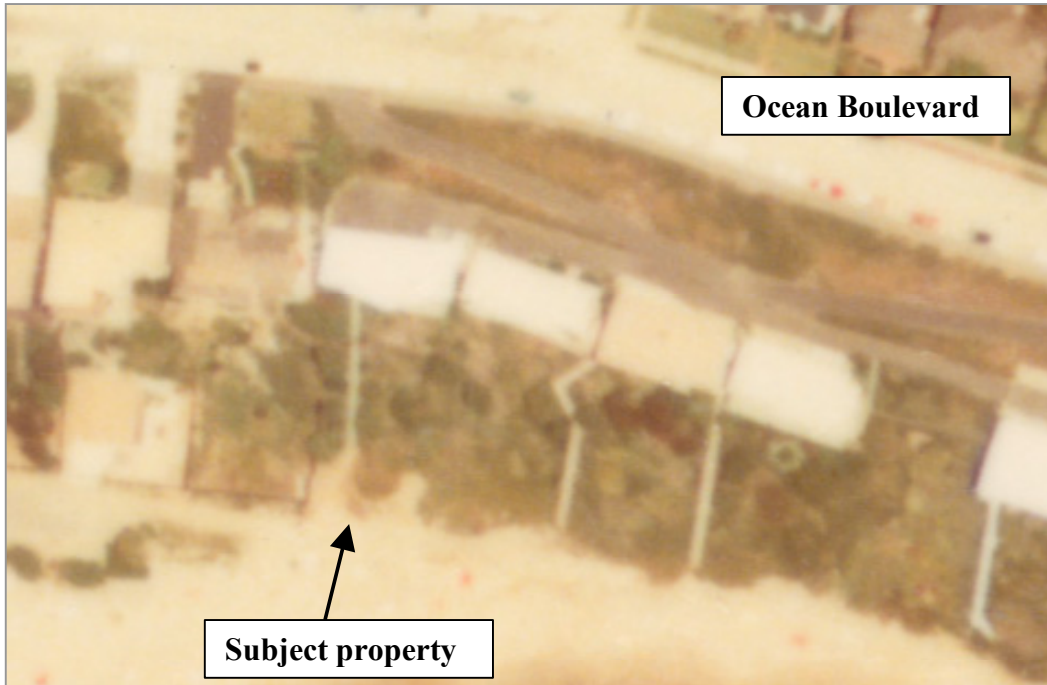


Image 4-23-78#203, California Dept. of Water Resources, April 23, 1978.

Exhibit 3c. 1978 photograph of subject property. Vegetation at base of bluff has retreated or has been removed. No development visible at base of bluff or on sandy beach portion of subject property.



Image 5-13-86#373, California Dept. of Water Resources, May 13, 1986.

Exhibit 3d. 1986 photograph of subject property. Vegetation at base of bluff has retreated or has been removed. No development visible at base of bluff or on sandy beach portion of subject property.



Image 4-14-93#31-2, California Dept. of Water Resources, April 14, 1993.

Exhibit 3e. 1993 photograph of subject property. Development is visible on sandy beach portion of subject property.